APPENDIX A

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

100800

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

DANIEL ALLEN ESSER,
Defendant-Appellant.

SC: 100800
COA: 176770
LC: 93-006291-AR
DD: 92-4984-SM

ORDER

Entered: March 31, 1995

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

APPENDIX B

COURT OF APPEALS
STATE OF MICHIGAN

Docket # 176770

L.C. # 93 006291

PEOPLE OF MI

v

DANIEL ALLEN ESSER

Harold Hood, Presiding Judge; Myron H. Wahls, Michael J. Connor, Judges.

ORDER

The Court orders that the motion for immediate consideration is GRANTED.

The application for leave to appeal is DENIED for lack of merit in the grounds presented.

The motion for bond is DENIED.

Date Aug. 26, 1994

APPENDIX C

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF GRAND TRAVERSE
13TH JUDICIAL COURT

Circuit Court No. 93-6291-AR
District Court No. 92-4984-SM

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,
v
DANIEL ALLEN ESSER,
Defendant-Appellant.

ORDER

At a session of said Court held in the City of Traverse City, County of Grand Traverse, on the 20th day of June, 1994

PRESENT: HONORABLE THOMAS G. POWER, Circuit Judge

The Court having reviewed Defendant-Appellant's Brief on Appeal and Plaintiff-Appellee's Answer in opposition, and further having heard argument from both parties, denies Defendant-Appellant's Appeal for the reasons set forth on the record and upholds the 86th District Court decisions. The Court grants Defendant-Appellant's request for a continuing bond for a period of no longer than fourteen (14) days from the date of the above hearing.

/s/ Thomas G. Power
THOMAS G. POWER, P24270
Circuit Court Judge

Executed: 6/21/94

APPENDIX D

STATE OF MICHIGAN
IN THE 86TH DISTRICT COURT
FOR THE COUNTY OF GRAND TRAVERSE

Case No. 92-4984 SM

PEOPLE OF THE STATE OF MICHIGAN,

v.

DANIEL ALLEN ESSER,
Defendant.

MOTION TO DISQUALIFY JURY PANEL
AND MOTION TO SUPPRESS

BEFORE THE HONORABLE JAMES R. MCCORMICK,
District Judge

Traverse City, Michigan—Monday, January 4, 1993

* * * *

THE COURT: Okay, thank you. I'm denying the motion, I—I think there is—it's an arguable proposition that defense makes and—but this court doesn't make up the rules on this subject, I'm confident that it is the thrust of Michigan case law from the higher courts that where the individual has not been told he's under arrest, has not been physically apprehended, has not been handcuffed, has not been told to take a seat in the back seat of the patrol car, that he is not deemed to be in custody for pur-

poses of the Miranda warnings. I agree with the defense that you can make an argument that a man in this circumstance would not feel free to say "Officer, I'm sorry, but I'm in a hurry, I'll catch you later." Needless to say, if you've been stopped by a police officer on a traffic stop and are being questioned, whether you're being questioned about your driving or you're being questioned about a murder that happened last week, you would not normally feel free to—to excuse yourself and start the car and drive off, so—and that is what the appellate courts have dealt with in saying that—that a brief traffic stop does not constitute custody for purposes of Miranda, that—even though you're not really free to leave, you're not in that type of a (sic) intimidating coercive environment where you would—where you might be expected to admit something against your will.

I guess I—I don't think—here where you're still out on the street, you know, you can still see the blue sky, breathing free air, that it is the viewpoint of the higher courts that the atmosphere surrounding the questioning is so intimidating, is so police-controlled, that a citizen might make an admission of guilt or admission against interest even though it wasn't so. This is nothing like the cases that led to the Miranda decision, classically there you're talking about somebody that is locked up, is being grilled, is in a totally intimidating environment with no friends, no advocates on his side and a very clever detective using all the powers of psychology to—to get him to say something he doesn't want to say. That's the other extreme, of course, but I—I think this case does not—it does not involve the kind of coercive atmosphere that as a matter of policy the appellate courts have chosen, to say triggers the necessity of Miranda, so I'm denying the motion.

* * * *

APPENDIX E

STATE OF MICHIGAN
IN THE 86TH DISTRICT COURT
FOR THE COUNTY OF GRAND TRAVERSE

Case No. 92-4984 SM

PEOPLE OF THE STATE OF MICHIGAN,

v

DANIEL ALLEN ESSER,
Defendant.

JURY TRIAL

BEFORE THE HONORABLE JAMES R. MCCORMICK,
District Judge

Traverse City, Michigan—Tuesday, January 5, 1993

* * * *

THE COURT: Well, okay, let's think about the—the consequences of different ways to deal with—I'm not going to dismiss the case, I don't believe that—that—my recollection of the case law, if the—if the witness makes a positive identification in court and maintains that that is based upon a clear recollection of the appearance of the defendant at the time of the crime, apart from any lineup or show up that might've occurred, then dismissal based upon an improper lineup is not appropriate. The question is what—what is the right remedy, and one way to deal with this, I guess, is for

me simply to abort any further questions regarding this subject, instruct the jury that it has been determined by our investigation while they were in the jury room that it's not clear which other pictures of other men were shown along with the picture of Daniel Esser at the time of the photographic lineup, and we determined that the—that lineup was not a valid comparison of his appearance with the appearance of other individuals, and that the jury should disregard any testimony concerning her having—having picked his picture out from the others; that's one way to approach it, and the question is does that do more harm than good?

Another possibility, and it would have to be within the option of the defense counsel, would be to have the Detective obtain from the—their files all other mug shots that they have on file of these individuals, and just lay it all out to the jury, in other words, bring it out for the jury's benefit, that in addition that it's possible that other than the pictures that are put together in this group of six, that—that any of these other mug shots of the same people might have been the ones shown and that it's impossible at this time to—to determine which mug shots were shown and let them look at all of them and make it—make of that what they will; whether that strengthens the prosecution or benefits the defense is—I don't know, but that's one possibility if the defense wanted to do it.

MR. TUBBS: Yeah, certainly I can't make that decision, I haven't seen the photographs as to, you know, I don't know, I think the fact of the matter is that the photographic lineup is tainted and we can't undo that taint, I think we just—we simply don't know, and I, you know, I don't think it's a matter it's not clear which ones, I think we just don't know at this point which photographs were used, and I think Detective Wooters has been honest in that regard that he doesn't know which ones he would've used at the time that he showed her.

whether those were the same that he showed me, or whether they're the same as here, or whether there's some other photographs that may exist in the files.

THE COURT: So the effect of it is that it's not necessarily true that the—that the process used on the day in question was tainted, but that—that it's now impossible to—to show the jury six pictures and say these are the six pictures that were shown to Autumn Rademacher, and you decide whether you not—whether you think that was a fair grouping, and that's—it's impossible to do that. Now, the Prosecutor has argued, based upon his assessment of case law, that—that there's no obligation on the part of the state to preserve evidence of this type—

MR. PAPPAS: Well, we—

THE COURT: —I presume absent a request.

MR. PAPPAS: —we should—

MR. TUBBS: You'd think if they were gonna use—

MR. PAPPAS: —your Honor, but case law has indicated that if by chance we have a mistake, as we have a mistake now, that dismissal of the entire case is not the appropriate remedy. The Court can fashion a remedy such as suppressing this portion of the testimony completely, okay, or the alternative, as the Court has given the defense counsel the object—I mean the choice, but dismissal of the case is not proper.

MR. TUBBS: But I'll—but I'll never know, I mean, the Defendant in this case will never know what she saw, and we'll never know whether or not that may have influenced her identification of Mr. Esser in the courtroom today; we will never know that, and that's not our responsibility, that's not, you know, I'm not saying anybody is to blame, but somebody's responsible and it wasn't us—

THE COURT: Sure, I think the—I think the courts have spoken on that point and have said that, I agree with the Prosecutor, that if—if she—now, if she were to say essentially, condition her testimony today by acknowledging that she can't remember exactly what he

looked like on the day in question, but she does remember that this man in court is—is one of the pictures that she saw, or one of the men that was in a lineup.

MR. TUBBS: But I certainly may have had a cross-examination, some cross-examination, for her if I knew at what she looked at, and there was—there was some real credibility problems. I may have had a cross-examination of her that may have said "Well, no, you know, the photographic lineup was pretty clear of Mr. Esser and yeah, maybe I do recognize him from the photographs," but I don't know what she saw.

THE COURT: Best you could do would be to show —you could say "Look, as to individual, subject number one, we don't know whether she saw this picture or this picture or this picture, as to subject number four, we don't know whether she saw this—well, except—not four, he's four, number three, we don't know whether she saw this or this or this,"—

MR. TUBBS: You know—

THE COURT: —which would muddy up the waters at most, but that's all from what defense wants to do.

MR. TUBBS: Yeah, I think—I think it would muddy up the waters, I think it—

THE COURT: Well, my experience, if defense is benefited by—usually by muddying up the waters in this type of circumstance, but in other words, it's the prosecution's contention that they have—they had a good photographic lineup and that picture number four was picked out by her by question and cross-examination could show that yes, picture four was picked out but we don't know what all other pictures were shown; we know that these other five individuals' pictures were shown, but we don't know that it was this or this or this version, we don't know whether it was the one in which he had a moustache or didn't, the one whether he had his glasses on or didn't, had a beard or didn't, had short hair or long hair, all of which would tend to discredit the—the show of. Alternatively, as I said, I'm willing to simply instruct the jury that—that there has—that we don't—that we don't know

which of the number of pictures of the same people were shown and as a result the—it's been determined that the —that the—the effort to have Defendant picked out by Autumn Rademacher from the pictures was—was defective and should be totally ignored. I would think that would be the best outcome, but I want to give you the alternative.

MR. TUBBS: Your Honor, I guess if you're presenting, you know, a couple of scenarios to defense counsel as to what possibly could be done, making it clear on the record, I'm not waiving my right to any appeal on the basis that this case is not dismissed at this point, and then I'd go to the next step and I have this option. You know, looking at it at this point, being confronted with this, at this point I would suggest that I—I think it would be best to instruct the jury that any testimony with respect to any photographic lineup that was presented to Autumn Rademacher is to be disregarded for the reason that it can no longer be determined what photographs were shown to Autumn Rademacher at the time she was given the photographic lineup, and I certainly don't want to be precluded from arguing in my closing that the defense is prejudiced by that.

MR. PAPPAS: Well, your Honor, I—I think that that's going a little bit too far, the Court can give an instruction that—to the jury that they are to disregard any testimony about identification by photo lineup, okay, and then in—but not—but not to allow defense counsel to then say "Well, we've been prejudiced because the prosecution has screwed up," okay, because the—because the testimony is clear that number four is the same photograph of the Defendant and that was picked out, okay, so I—

THE COURT: Well, I—I don't know, I mean, I—as long as I'm not telling the jury that—that the Defendant's been prejudiced or—or throwing the case out for that reason, I'm kind of reluctant to tell the defense counsel what he can and cannot argue to the jury. If he wants

to argue to the jury that they—the prosecution screwed up in this photographic lineup and the—it may have hurt my client because it may be that—that the group of pictures that were shown were not representative or not—not similar and we'll never know exactly, and—and we think that that may have led to her identifying him today. I mean, I—I don't think that he can be prevented from—from arguing that the photographic lineup was—was botched and—and the—the results were suggestive of—had you—he was prepared, obviously, to come in here today and argue that this group of—of pictures that were shown to her included five people that were unlike him and that at best two of them had glasses, and she clearly remembered him as wearing glasses, she remembered him as being overweight, a heavy man, and some of those pictures don't look like heavy men at all, at least not in the face, I mean, I—he was prepared to argue that the—that the—that the photographic lineup was suggestive of him, that there weren't comparables, and now because they're not gonna—we're not gonna do that, as a result he's—I just—I guess I'm kinda reluctant in terms of avoiding committing further error here to say that the defense counsel can't argue that the photographic lineup in this case was unfair or damaging, even though he can't get into the specifics because the jury isn't gonna have any specifics.

MR. PAPPAS: Well, see, that's the problem, your Honor. If—I could see that argument if—if defense had chosen the alternative that the Court provided, let's have all the pictures that possibly could have been involved, and let—and then he can argue to the jury "Look, based upon all these pictures, we don't know which ones were shown," okay, "look," you know, "here's a guy with glasses, here's a guy," you know, "the same guy without glasses, here's a guy with—clean-shaven, here he is with a beard, and we don't know which one was shown." Then he could argue that, but for—but for the Court to say to the jury "Disregard the testimony," okay, they're

supposed to disregard the testimony and just ignore it, but then to allow defense counsel to then get a—to get a bite at the apple by saying "Hey, and disregard it because the prosecution," you know, "screwed up the lineup and that prejudiced my Defendant, because now we don't know—we don't know what those other pictures were like," so that's why my argument is if the Court is inclined to give the instruction disregard it—the testimony—then the testimony is suppressed and I and defense counsel should make no mention whatsoever of the photo lineup whatsoever, or any inferences from that. If defense decides to yes, your Honor—yes, your Honor, we'd like to take the option of having all of the pictures, then he has free reign to argue "And it could have been this picture that was shown to Autumn Rademacher, and this picture does not have any glasses, while the picture of Mr. Eiser (sic) does have glasses, so that would be unduly suggestive." I could see that happening, but not if the Court is going to instruct the jury to disregard the testimony.

THE COURT: Okay, okay, you make a—

MR. TUBBS: I—I—see—and again, I'm at this point, I don't want to belabor this Court—with the Court, but I think, you know, I'm at the point where it's just not fair to the Defendant anymore, there's no fair way for the Defendant in this case because of what happened. I think, you know, I was prepared to argue she was—you know, and I think could make reasonable inferences to the jury and make an argument that she could have seen Mr. Esser in the park before, although she didn't specifically remember him, she could have seen him although couldn't recall—consciously recall. When shown a photograph with five other photographs that I don't know what they were, that that may have led her to look at Mr. Esser, and between the two, I think I can make that argument to the jury although she pointed him out, that she was led to believe who the Defendant was and was able to identify him, obviously she'd seen his picture

before, so it was easy for her to make an identification of Mr. Esser if she hadn't seen pictures of anybody else before, and so I think I—I want to obviously make that argument to the jury in my closing, and as far as bringing other photographs in, I mean, we're presenting photographs that we—there is no testimony as to whether those are the photographs that she saw, and I don't think we can show those to the jury. We don't—we don't know, there's no foundation as to whether she saw any particular photograph, and—and without being able to lay the foundation, I don't think we can show it to the jury.

THE COURT: Well, you've already chosen which of the two ideas I gave you you want to follow, I guess Mr. Pappas has persuaded me that if the jury's gonna be instructed to completely disregard the—the photo lineup and any identification made from the photo lineup on the basis that the—it's impossible now to determine exactly what group of people were shown to her, then on the one hand the Prosecutor is barred from—from arguing that she correctly picked Daniel Esser's picture out from that lineup, it seems that would be—

MR. TUBBS: Sure, he doesn't need to do that, I mean—

THE COURT: —seems to me that the converse is that—that the defense can hardly argue because it's not —there's nothing in this record from which you could argue that the—the particular composition of subjects who were used in the—in the photo lineup was an unfair group of snapshots.

MR. TUBBS: There—there was testimony from her that she saw a photographic lineup, and that she picked Mr. Esser out of a photographic lineup, and I think we've got—and I may be mistaken, we'd have to go back in the record, but I think we got from Detective Wooters that she pointed out number four, so there's been testimony from two witnesses that she picked him out, and—and so I think it's clear that she saw a photograph of

Mr. Esser. At this point, you know, I think I'm entitled to argue that she saw a photograph of Mr. Esser, that it obviously makes it easier for her to make an identification in court having seen a picture of Mr. Esser before, but we don't—but we don't know, the defense doesn't know, who else she saw. We don't—we don't know what the people looked like in the pictures that she saw.

THE COURT: Okay, you're not in a position to argue that the particular group of pictures was an unfair group, because—because—

MR. TUBBS: I don't know if it was or wasn't.

THE COURT: —well, no, but you—at—as things stand, the—the jury is not gonna be shown the pictures, they're gonna be instructed to completely disregard the—the photo lineup and disregard the ID made from the photo lineup, so you would not—could not—logically argue to the jury, because there's no record from which you could argue to the jury, that the other five snapshots were sufficiently unlike him, or—nor can the Prosecutor argue that they were sufficiently like him, because—because we're—we're rejecting as an exhibit all this material. I—I guess I'm more inclined to—to agree, and I'd like to hear Mr. Pappas' response on that, if he has one, but that perhaps it is appropriate to allow the defense in closing argument to argue that one point from the photo lineup, namely, that she saw him one time on the—she claims she saw him one time on the street and she saw his—she saw his picture, his picture was shown to her along with some others and he picked that out—she did pick that out, and now she sees this man here today whose picture was shown to her. She now says "Yes, that's the man who exposed himself to me." Isn't it possible that having seen this man's picture is suggestive? I mean, I—if that's what you want to argue—

MR. PAPPAS: That'd be fine with the prosecution.

THE COURT: Pardon?

MR. PAPPAS: To that line, your Honor, that would be fine with the prosecution, that he could say that her in-court identification now, even though we have testimony from her that it's independent of the photograph, I—given the circumstances of what we're in, I—I mean, I would go that far, but not the other part that Mr. Tubbs wanted. I mean, that could be a logical inference that he could argue.

MR. TUBBS: I just—I—I—I really have a problem, your Honor, I just—my sense of fairness is—has been violated, I think, and I just still do not see how it's fair that—that one thing can lead to another. Her identification in the photographic lineup can in fact lead to her identification of Mr. Esser here, and we'd have no ability to go back to look at whether or not when she originally saw Mr. Esser that—that she was directed to him by whatever the photographic lineup may have been and by some of the things that I was going to point out with the lineup that I thought she saw. We can't undo that, and we cannot undo and I cannot cross-examine her—

THE COURT: Well, I—I'm comfortable—okay, I'm comfortable with my ruling on that point, so I'm not gonna reconsider it. I—I—I'm going to authorize, and I now—I believe that the prosecution does not object to that, that even though the—I'm instructing the jury—I will be instructing the jury—that the photographic lineup is to be disregarded as any proof in the matter and that any ID made from the—of this man from the photographic lineup should be completely disregarded on the basis that we—we—we cannot put together the group of pictures today so they could be evaluated or shown to the jury or critiqued, but the—the—the defense can still make the closing—in closing argument the contention that the fact that he was shown a picture of Daniel Esser may very well have played a factor in her ability today to say "I recognize this man as the man who was out on the street," so to that extent, I think that despite the fact

that the photo lineup is being rejected as evidence and the jury is gonna be so instructed, that defense can still—has to be allowed to make that argument.

MR. TUBBS: The Court—the Court asked defense counsel what preference would be of those two options, and I think my initial preference was option B, if you want to call it that, and with the assumption, I think, that I, you know, assumed I would argue this, and now the Court is telling me that my argument in that regard would be limited. I don't really know what my best decision should be for my client at this point.

THE COURT: Well, what—what further argument—what further argument could you—

MR. TUBBS: Well, no, I—I just wanna—what I'm asking—what I'm thinking to myself in light of—of the Court would be doing that if I chose option B to exclude—to exclude any testimony in that regard, that I would be limited to say that she may have been tainted by a photograph that she saw.

THE COURT: What else could you say?

MR. TUBBS: Well, I guess what I'm wondering at this point is now should I look at those other photographs and say well maybe my option A is the better option for me in light of what the Court is telling me that I will not be able to argue under option B, and I'm not trying to—I'm not trying to get both ways, but I just—I've been confronted with a situation that I didn't expect to be in, and I'm just trying to make the best decision for my client.

THE COURT: Well, okay, so am I. Under option B, that is that I'm gonna tell them to disregard the photo lineup, what other argument could you, in this state of the record, make to the jury from the photo lineup other than the one we've been talking about?

MR. TUBBS: I think the Court has told me that I could not argue—

THE COURT: Well, what—what other one is there, what other possible argument could there be?

MR. TUBBS: Well, I think to argue that the defense counsel has no way of knowing what those photographs were shown, what they are, we don't know what they are, and all we know is that she picked out a photograph amongst photographs that we do not know which existed, so we don't know what she saw and what she didn't see, but we know that she saw—

THE COURT: Well, I will—I will have—I will have instructed them that essentially for that fact.

MR. TUBBS: Then if I could argue that in my closing, I think that basically the extent of my closing would be to say "We don't know what she saw and what she didn't see, all we know is that she picked out a photograph, there was testimony that she picked out a photograph of Dan Esser, and that may have led her or made it easier for her to make an identification of Mr. Esser in court today, but that the defense counsel does not have an opportunity to look at what other photographs that she saw at that time, we don't know."

MR. PAPPAS: Your Honor, I would object to—to that, because then you would have the jury speculate endlessly, it could have been five black men plus Daniel Esser whose pictures were shown, it could have been five dwarfs, it could have been anything—

MR. TUBBS: It could have been, for all I know, your Honor, I mean—

MR. PAPPAS: Well, we've had testimony—that's not true—

THE COURT: Well, no, that's not true, we—we have the sworn testimony of the Detective, unless you want to question that, that—that it was these five individuals but—but some of them had more than one mug shot on file, that's all, so there's—it would be a minor difference in the—to the extent that you take three pictures of the same person a year apart, they're gonna look

a little different depending upon how they wore their hair and so forth.

MR. PAPPAS: So I think the—the—

MR. TUBBS: Or whether they're fatter or thinner.

MR. PAPPAS:—the Court's allowing defense counsel to argue to the jury that—that perhaps based upon Autumn Rademacher's identification in the photo lineup, that her identification now today is tainted because she's seen a picture of him and picked him out, okay, that, under the circumstances, the prosecution would concede, but beyond that I think is stretching it too far.

THE COURT: I agree, that's where I would draw the line, and I would—because I will be instructing the jury on the other point, the fact that the—that all of this evidence regarding the photo lineup is to be disregarded, it's not to be used, any ID made in it is—is not valid, not to be considered, because we're not able today to put together the group of pictures and so that they could be argued and shown.

MR. TUBBS: Is—is—I don't know if—if this is a possibility, but for us to have a continuance at this point for the defense to get an opportunity to examine the photographs that she may have seen and for us to have that opportunity to do that, and—

THE COURT: Well, you would only need—I imagine a matter of a few minutes if those pictures could be brought over from next door.

MR. TUBBS: If—maybe—maybe we should do that, give the defense an opportunity to take a look at that so that we know what maybe we're dealing with, 'cause to some extent we're in a little bit of a vacuum 'cause I don't know what those photographs are.

THE COURT: Mr. Pappas?

MR. PAPPAS: I have no objection, your Honor.

THE COURT: Okay, first of all, I think I'm gonna call the jury in and tell 'em that we've had a delay, just—or maybe it's sufficient to just ask the bailiff to

just let them know that we've had the—we've had some evidence problems and we'll be calling them out as soon as we can, just something like that.

(Bailiff relays message to jurors)

THE COURT: Okay, let's take a recess and then ask Deputy Wooters to get the pictures over as quickly as we can.

(At 3:50 p.m., court recessed)

(At 4:08 p.m., court reconvened)

THE COURT: Mr. Tubbs, I understand you have now had a chance to look at the other mug shots of the individuals who—whose pictures were shown along with Mr. Esser's.

MR. TUBBS: Your Honor, I have had that opportunity, I've had the opportunity to discuss this with my client in private. I think what the defense will elect to do in light of the Court's ruling on our motion would be to select the option that the instruction would be made to the jury that they are to disregard any testimony that has been offered both through Autumn Rademacher and through Detective Wooters as to any identification that was made in the photographic lineup.

THE COURT: Okay, are we ready to—oh—

MR. TUBBS: I—I just—I just want to make sure then, just so that we don't have a problem later on with what I say or don't say, is that in my closing I may make an argument to the jury that her identification of Mr. Esser may have been tainted by the fact that she had previously seen a photograph of him, that that would be the extent of any remarks I may be allowed to make with respect to the photographic lineup.

THE COURT: That's correct.

MR. PAPPAS: That's fine, your Honor.

MR. TUBBS: I—and just for purposes of the record, again, I would just state that I object, that I think I can

do more than that, but let's cut this short and be on with it.

THE COURT: Okay, I—I think you've made that point, so let's call the jury in and continue.

(At 4:09 p.m., jury returns)

THE COURT: Okay, everybody's here, you may be seated and this is going a little slower than we expected, we had—had some problem and I'll be pointing this out again at the end of the trial, but in turns out that we cannot ascertain today exactly which pictures were shown to Autumn Rademacher by Detective Wooters, from which group he picked out a picture of Mr. Esser, so we determined that the jury is gonna have to completely disregard all testimony, all evidence, having to do with this photographic lineup of pictures. It's—it's, as I say, it's not possible today for us to reconstruct exactly what pictures were shown to her, so it's not possible for you to see whether or not it was a—a fair and reasonable sampling of other pictures of people of the same rough description, so because it's not possible to do that, the—the effect of that identification is that it should be completely thrown out and we're not gonna use it at all. You're not going be seeing any of those pictures and the fact that she did pick out a picture of Mr. Esser has—has no value in the trial from this point forward, and it's —you're not gonna be hearing any more evidence at all about that, so with that, are there—do you have any other questions to the Detective?

MR. PAPPAS: No, your Honor.

* * * *

APPENDIX F

STATE OF MICHIGAN
IN THE 86TH DISTRICT COURT
FOR THE COUNTY OF GRAND TRAVERSE

Case No. 92-4984 SM

PEOPLE OF THE STATE OF MICHIGAN,

v.

DANIEL ALLEN ESSER,
Defendant.

MOTION FOR JUDGMENT OF ACQUITTAL
AND NEW TRIAL

BEFORE THE HONORABLE JAMES R. MCCORMICK,
District Judge

Traverse City, Michigan—Monday, March 29, 1993

* * * *

MR. PAPPAS: Your Honor, just a point of contention, the trial wasn't held until January.

THE COURT: January?

MR. PAPPAS: Yes.

THE COURT: Okay, I was thinking it was late November.

MR. PAPPAS: So it was even a longer time.

THE COURT: Okay, so we're talking from July 30th, I don't know exactly what date she was shown the picture, but I assume it was sometime within a week anyway after that, so we're talking about August, Septem-

ber, October, November, December, sometime in January, we're talking about over five months between the time that the incident happened and she was shown a group of snapshots, and then her next opportunity to see the man, she never saw the picture in between, that's the information that we have. It would not seem to me that—that having looked at, let's say, half a dozen snapshots of different people, she probably looked very carefully at each one and then she said "That's him," that—that that picture, that's assuming that it wasn't him, she picked out a picture of somebody who was—who did not commit the offense, that she would be left with such a strong recollection of the picture—not the man but the picture—that she would walk into court five or six months later and look at somebody and say "That's him," and what she really would be doing without knowing it would be—would be saying "That man looks like the picture I saw." That does psychologically, from my understanding of how people and how I think and remember, that doesn't seem too likely. If you—if you saw a picture of somebody in the newspaper, even though you might look very carefully at them at the time and really be interested in the article, and then five months later that you would—that you would actually remember that face from the picture I think is—is really stretching the point, I just don't think people remember faces from seeing them briefly in a picture several months later, unless it's the Mona Lisa or something like that, so I—I guess that's one point and the various other points were argued here regarding the—the influence of the picture as opposed to the man she saw running down—when she was running down the street controlled her in-court ID. Several factors there that lead me to think that—that her in-court ID was sufficiently reliable, that it should not have been struck from the record and that it could form partially the basis for the conviction.

It's true that she was obviously traumatized by what she saw, and as it's argued in the defense counsel's brief,

she admitted that she was only in the position to really look at him for a matter of several seconds as she jogged by his car. She was close as I remember, like within perhaps ten feet, quite close in any event. She probably would've looked at him in the face first and then she saw what he was doing. I can't imagine that she—that her eyes stayed fixed on the offensive act that he was doing, she probably looked away from that real fast, that would seem normal, probably back to his face. I don't think it to be unreasonable or unrealistic to think that a—a teenage girl jogging by a car, looking to her side and suddenly there's a man sitting in a car masturbating and looking at her, that she would see that face for a long time, even though she only saw him for a short time then. This is the kind of thing people have nightmares over. I think it could very well leave a strong enough impression that six months later she walked in the courtroom and saw him that she would say "That is him unquestionably" that that is very plausible.

All in all, I—I think that the—that that evidence was legitimate, not tainted, not significantly tainted, and it obviously formed a (sic) important piece of evidence in the conviction, and I think that that's as it should be under the law. The jury has spoken and I'm gonna allow the verdict to stand and deny the motion for a new trial.

MR. PAPPAS: Thank you, your Honor.

THE COURT: That's all.

(At 2:07 p.m., proceedings concluded)